



IN THE

Supreme Court of the United States

No. **76-1164**

Term, 1977

JEFFREY PETER SNYDER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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IN THE
Supreme Court of the United States

No. Term, 1977

JEFFREY PETER SNYDER,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Opinions Below

The decision of the Court of Appeals is not yet reported. It is set out in the Appendix, *infra*, at pages 12-15. There was no written opinion given in the District Court. The Third Circuit Court of Appeal Judgment Order dated January 11, 1977, affirming the District Court's judgment and its Order dated January 24, 1977, denying a reargument and reaffirming the District Court's judgment.

Statement of Jurisdiction

28 U.S.C.A. 1254(1) confers jurisdiction on this Court. Jurisdiction is further based on United States Court of Ap-

peals for the Third Circuit has "... decided an important question of federal law which has not been, but should be, settled by this court ..."

Questions Presented

1. Whether the Court erred in instructing the jury, as to all four counts of the indictment, that it was immaterial whether or not the petitioner had knowledge, at the time the federal agents presented themselves before him, that such persons were officers of the United States.

2. Whether the Court erred in failing to dismiss Count Four of the indictment, when the Government's evidence as to Count Four did not prove beyond a reasonable doubt that petitioner violated Section 1501 of Title 18, United States Code, but merely demonstrated that petitioner fled from certain federal agents.

3. Whether the Court erred in failing to dismiss Counts Two and Three of the indictment, or in refusing to render directed verdicts in favor of petitioner, where both counts involved conduct of the petitioner constituting a single act or transaction upon which petitioner's conviction for the First Count of the indictment rested, in violation of petitioner's Fifth Amendment right to be protected from double jeopardy.

Statement of the Case

Petitioner, Jeffrey Peter Snyder, was charged in a four count indictment with forcibly assaulting an officer of the United States, forcibly resisting, opposing, impeding, intimidating and interfering with an officer of the United States, using force and threats of force to intimidate and impede officers of the Internal Revenue Service, and knowingly

and willfully obstructing, resisting, or opposing officers of the United States while the officers were attempting to execute a warrant of arrest, in violation of Sections 111 and 1501 of Title 18 and of Section 7212 (a) of Title 26, United States Code. Petitioner's motions to dismiss counts 2, 3, and 4 of the indictment, and motions for directed verdicts as to counts 2 and 3 were denied. Petitioner was found guilty on all four counts, and was sentenced. Petitioner's motion for a new trial was also denied. This appeal is taken from the final sentence entered July 23, 1976.

A summary of the relevant facts shows that on the morning of April 22, 1976, Jeffrey Snyder responded to two persons knocking at the door of his residence located at 6521 Darlington Road, Pittsburgh, Pennsylvania. According to Snyder the individuals did not identify themselves to him in any manner, and thus he was unaware that the individuals were agents of the Internal Revenue Service. Snyder went upstairs to summon a friend whom Snyder thought was to travel to school with the two persons who had come to the house. Snyder's friend, Keith Miller, went downstairs, and Snyder followed shortly thereafter and observed one of the individuals handing a piece of paper to Miller. Snyder asked the two persons to leave the residence, they proceeded to leave, and Snyder apparently placed his hand on the back of the neck of Special Agent Parks and escorted her to the door believing these individuals were not privileged to remain on the premises (Tr. Pg. 7-16, 20-21, 31-32, 43-48, 286-292, 307-312).

On the evening of April 22, 1976, Snyder was driving by 6521 Darlington Road when he observed three individuals standing near an automobile parked in front of the residence. Snyder proceeded in his car farther down the road, and short-

ly thereafter, a green automobile stopped next to his and the federal agents in the car apprehended him. Snyder asserts that at no time did any one of the three individuals identify himself as a federal agent by displaying a badge or by any other manner (Tr. Pg. 104-114, 131-138, 315-319).

Jurisdiction of the Third Circuit Court of Appeals was invoked pursuant to 28 U. S. C. 1291, in that the appeal was from a final judgment of the District Court for the Western District of Pennsylvania.

REASONS FOR GRANTING THE WRIT

There are three issues which counsel seeks to assert in the appeal of this case: (1) that the Court erred in instructing the jury, as to all four counts of the indictment, that it was immaterial whether or not the petitioner had knowledge, at the time the federal agents presented themselves before him, that such persons were officers of the United States; (2) that the Court erred failing to dismiss Count Four of the indictment, when the Government's evidence as to Count Four did not prove beyond a reasonable doubt that petitioner violated Section 1501 of Title 18, United States Code, but merely demonstrated that petitioner fled from certain federal agents; (3) that the Court erred in failing to dismiss Counts Two and Three of the indictment, or in refusing to render directed verdicts in favor of petitioner, where both counts involved conduct of the petitioner constituting a single act or transaction upon which petitioner's conviction for the First Count of the indictment rested, in violation of petitioner's Fifth Amendment right to be protected from double jeopardy.

1. The Court erred in instructing the jury, as to all four counts of the indictment, that it was immaterial whether or not the petitioner had knowledge, at the time the federal agents presented themselves before him, that such persons were officers of the United States.

The trial judge erroneously stated in his charge to the jury that as to all four counts in the indictment it was immaterial whether or not the petitioner had knowledge, at the time the federal agents presented themselves before him, that such persons were officers of the United States. It has been a general rule since *Pettibone vs. U. S.*, 13 S.Ct. 542, 148 U. S. 197, 37 L.Ed 419 (1893) that the prosecution must allege and prove knowledge on the part of the petitioner that those persons whom he endeavored to improperly influence, intimidate or impede were federal officers engaged in the performance of their duties.

With regard to specific sections of the U. S. Code contained in the several counts of petitioner's indictment, Title 26 U.S.C. § 7212(a) definitely requires knowledge of the federal agents' identity as an officer as an element of the offense set forth in that section. *U. S. vs. Rybicki*, 403 F.2d 599 (C.A. 6, 1968) stated clearly that the district judge's failure to instruct the jury that the petitioner, who was charged with obstructing the administration of internal revenue laws (26 U.S.C. § 7212(a)), had to know that men who were seizing his property were internal revenue agents, was a failure constituting plain error and resulted in the reversal of petitioner's conviction. This position has been adopted in the 3rd Circuit in *U.S. vs. Johnson*, 462 F.2d 423 (C.A. 3, 1972) as to Section 7212(a).

As to count four of the indictment, involving 18 U.S.C. § 1501, the case of *Sparks vs. United States*, 90 F.2d 61 (C.A. 6,

1937) held that the statutory predecessor of Section 1501—18 U.S.C. § 245—required that in a trial for resisting an officer of the United States it must be shown that the person resisted was an officer, and that the accused was aware of that fact.

While *U.S. vs. Johnson, supra*, has decided for the 3rd Circuit that in a prosecution under 18 U.S.C. § 111, (counts 1 and 2 of petitioner's indictment) specific knowledge of the victim's status as a federal officer is not an essential element of the crime, the cases of *U. S. vs. Perkins*, 488 F.2d 652, (C.A. 1, 1973), *U. S. vs. Goodwin*, 440 F.2d 1152 (C.A. 3, 1971), and even the recent U. S. Supreme Court case of *U. S. vs. Feola*, 420 U. S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975) suggest that qualifications ought to be applied to this general position.

The *Feola* case concurs with the *Johnson* decision that in general, scienter is not an element of this particular statutory offense; yet the Supreme Court has noted certain exceptional circumstances where knowledge of the federal agents' status is determinative:

"We are not to be understood as implying that the defendant's state of knowledge is never a relevant consideration under § 111. The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent."

The petitioner, not having been made aware at the time that the persons inside his residence were in fact federal agents,

employed reasonable force to remove them from the premises.

U.S. vs. Goodwin, supra, follows the *Feola* position, that in a Section 111 prosecution the defendant may cast doubt upon the existence of *mens rea* by showing that, under the circumstances, he reasonably believed the facts to be other than they were and that his actions would have been innocent had his belief been correct, with the burden on the prosecution to remove such doubt by offering evidence to disprove the mistake of fact.

For the foregoing reasons, petitioner submits that the instructions to the jury to the effect that knowledge of the status of the federal agents was immaterial, is erroneous as to all four counts of the indictment.

2. The Court erred in failing to dismiss Count Four of the indictment, when the Government's evidence as to Count Four did not prove beyond a reasonable doubt that appellant violated Section 1501 of Title 18, United States Code, but merely demonstrated that petitioner fled from certain federal agents.

It is undisputed in the record that on the evening of April 22, 1976, petitioner did not assault, beat or wound any officer of the United States. Taking the evidence presented in a light most favorable to the prosecution, it is clear that petitioner did not obstruct, resist or oppose any officer of the United States, but on that same evening merely fled in a vehicle from the federal agents involved. Thus, the prosecution has failed to prove an essential element of the offense charged in Count Four of the indictment, that petitioner committed acts proscribed by Section 1501 of Title 18 of the United States Code.

In *Miller vs. U. S.*, 230 F.2d 486 (C.A. 5, 1956) it was held in a prosecution under 18 U.S.C. § 1501 for knowingly and wilfully obstructing, resisting and opposing a Deputy United States Marshall in his effort to serve a subpoena on a bank robbery witness, that where the defendant had harbored the witness for several days, had denied a deputy's first request to be admitted to her home when informed that he had no search warrant, and had denied the presence of the wanted witness although the deputy knew her to be lying, the conduct of the defendant was insufficient to warrant her conviction. The *Miller* court stated:

" . . . we are emphatic in our view that certainty in the nature of criminal offenses forbids . . . the use of this section [18 U.S.C. § 1501] as a catchall to make crimes out of actions which law-enforcing agents may feel to be undesirable, but which Congress has not seen fit to proscribe." (page 488).

The case of *U.S. vs. Cunningham*, 509 F.2d 961 (C.A.D.C., 1975), while concerned with a related offense (18 U.S.C. § 111), describes activities that fall outside the scope of illegal conduct in dealings with officers of the United States:

"It is clear that all failures to cooperate with federal agents are within the statute's prohibition, and that some measure of presently applied force is required. Threats of the future use of force are not enough, *United States v. Glover*, 321 F.Supp. 591 (E.D.Ark. 1970), nor is mere deception of a federal agent, *Long vs. United States*, 199 F.2d 717 (4th Cir. 1952), nor, presumably, would be the mere refusal to unlock a door through which federal agents sought entrance. Cf. *District of Columbia vs. Little*, 339 U.S. 1, 70 S.Ct. 468, 94 L.Ed. 599 (1950) (construing District of Columbia regulation outlawing the 'interfering with or preventing [of] any inspection' by a health officer."

It has been the position of several state courts, including Pennsylvania's, that no offense of obstructing or interfering with an officer in the performance of his duty is committed by the act of a person in running away from an officer who is attempting to arrest that person (67 C.J.S. 52, 44 A.L.R.3d 1018).

3. The Court erred in failing to dismiss Counts Two and Three of the indictment or in refusing to render directed verdicts in favor of petitioner where both counts involved conduct of the petitioner constituting a single act or transaction upon which petitioner's conviction for the First Count of the indictment rested, in violation of petitioner's Fifth Amendment right to be protected from double jeopardy.

Petitioner submits that his trial and conviction on the three counts concerning the events of the morning of April 22, 1976 (two counts involving 18 U.S.C. § 111, one count involving 26 U.S.C. § 7212 (a)) violates his Fifth Amendment right not to be placed in jeopardy twice for the same offense. The above three counts involve the same transaction, and the convictions on all three counts were based on the same evidence presented at trial. *U.S. vs. One Dodge Sedan*, 113 F.2d 552 (C.A. 3, 1940).

Taking the evidence presented in a light most favorable to the prosecution, the testimony given concerning the events of the morning of April 22, 1976 (Tr. Pg. 7-16, 20-21, 31-32, 43-48) shows that at most petitioner on a single occasion applied physical force to Special Agent Parks by placing his hand on the back of her neck and escorting her to the door after the summons had been served by the Special Agents. The record reveals that petitioner did not forcibly assault Agent Parks at any other time, nor did he assault any other officer of the

United States, did not obstruct or impede these agents by preventing their entrance or exit from the building, nor did in any other way interfere with their official duties. Thus petitioner's convictions on the first three counts in the indictment rest on a single physical act, which act was considered sufficient proof to return a conviction on each of the three indictments. Offenses are the same for the purposes of double jeopardy protection when evidence required to support conviction upon one of them would have been sufficient to warrant conviction upon the other. *U.S. vs. Mallah*, 503 F.2d 971 (C.A. N.Y., 1974).

Vile or obscene language which the evidence shows was employed by petitioner during this morning incident does not constitute conduct of a nature serious enough to warrant a conviction for forcibly assaulting or for forcibly resisting, opposing, impeding, intimidating or interfering with an officer of the United States (18 U.S.C. § 111), nor does such language constitute the offense of using force or threats of force to impede or intimidate any officer acting on behalf of the Internal Revenue Service (26 U.S.C. § 7217 (a)). The word "forcibly" as used in Section III refers to the string of verbs following it and not merely to the first verb "assaults"; obscene language alone has no characteristics of force. *Long vs. U.S.*, 199 F.2d 717 (C.A. 4, 1952). To convict under any portion of Section III requires proof of an ability to inflict harm, not merely proof of an interference with the performance of a duty. *U.S. vs. Johnson*, 462 F.2d 423 (C.A. 3, 1972).

The *Johnson* case cited above involves a defendant whose convictions on two of three counts (identical to the first three counts brought against appellant) were affirmed on appeal, and whose double jeopardy argument was rejected by the Court of Appeals. The instant appeal is distinguishable, however, on the basis that Johnson was found to have

engaged in two distinct acts that were the separate facts necessary to sustain multiple convictions. Where Johnson was shown to have physically assaulted officers of the Internal Revenue Service and physically obstructed their access to a building, petitioner was found only to have physically assaulted one federal agent. Thus, in the *Johnson* case separate and distinct facts were available upon which multiple charges could be brought and sustained, whereas petitioner's convictions on the first three counts in the indictment improperly rested upon a single factual episode, violating petitioner's Fifth Amendment guarantee against the hazards of double jeopardy.

Conclusion

WHEREFORE, Snyder respectfully requests the Court to reverse the judgment of conviction and to dismiss the indictment, or in the alternative to remand the case to the District Court for a new trial.

Respectfully submitted,

VINCENT C. MUROVICH,
Attorney for the Petitioner—
Jeffrey Peter Snyder.

APPENDIX

Judgment Order Dated January 11, 1977

UNITED STATES COURT OF APPEALS

For the Third Circuit

 No. 76-2005

UNITED STATES OF AMERICA,

v.

JEFFREY PETER SNYDER,

Appellant.

 (D. C. Crim. No. 76-95)

Appeal From the United States District Court for the
Western District of Pennsylvania

Submitted Under Third Circuit Rule 12(6)
January 10, 1977

Before GIBBONS and GARTH, *Circuit Judges*,
and COHEN*, *District Judge*.

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15219, Attorney for Appellant.

Blair A. Griffith, United States Attorney, John Paul
Garhart, Asst. United States Attorney, 633 U.S. Post Office &
Courthouse, Pittsburgh, Pennsylvania 15219, Attorneys for
Appellee.

* Mitchell H. Cohen, United States District Judge for the District of New
Jersey, sitting by designation.

Appendix—Judgment Order Dated January 11, 1977.

In this appeal from a judgment of sentence for violations of
18 U.S.C. § 111, 18 U.S.C. § 1501 and 26 U.S.C. § 7212 (a) ap-
pellant contends

(1) that the court should have charged the jury that
knowledge that the victim is a federal officer is required
for a conviction under 18 U.S.C. § 111.

(2) that the court failed to charge the scienter re-
quired for conviction under 18 U.S.C. § 1501 and 26
U.S.C. § 7212(a).¹

(3) that the verdict is not supported by the evidence.

(4) that counts two and three of the indictment in-
volve a single act or transaction and thus violates the
double jeopardy provision of the Fifth Amendment.

We find each of these contentions to be without merit.

It is ORDERED and ADJUDGED that the judgment of the
district court is affirmed. No costs.

By the Court,

JOHN J. GIBBONS,
Circuit Judge.

Attest

THOMAS F. QUINN,
Clerk.

Dated: Jan 11 1977

¹ The appellant has not furnished a transcript of the court's charge to the
jury, and has not replied to the Government's representation, brief p. 10,
that a charge in conformance with *United States v. Rybicki*, 403 F.2d 599 (6th
Cir. 1968) and *Sparks v. United States*, 90 F.2d 61 (7th Cir. 1937), was in fact
given.

Appendix—Judgment Order Dated January 24, 1977.

Judgment Order Dated January 24, 1977

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 76-2005

UNITED STATES OF AMERICA,
v.

JEFFREY PETER SNYDER,

Appellant.

(D. C. Crim. No. 76-95).

Appeal From the United States District Court for the
Western District of Pennsylvania

Submitted Under Third Circuit Rule 12(6)
January 24, 1977

Before GIBBONS and GARTH, *Circuit Judges*,
and COHEN*, *District Judge*.

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Appellee.

* Mitchell H. Cohen, United States District Judge for the District of New
Jersey, sitting by designation.

Appendix—Judgment Order Dated January 24, 1977.

In this appeal from a judgment of sentence for violations of
18 U.S.C. § 111, 18 U.S.C. § 1501 and 26 U.S.C. § 7212(a) ap-
pellant contends:

(1) that the court should have charged the jury that
knowledge that the victim is a federal officer is required
for a conviction under 18 U.S.C. § 111.

(2) that the court failed to charge the scienter re-
quired for conviction under 18 U.S.C. § 1501 and 26
U.S.C. § 7212(a).

(3) that the verdict is not supported by the evidence.

(4) that counts two and three of the indictment in-
volve a single act or transaction and thus violates the
double jeopardy provision of the Fifth Amendment.

We find each of these contentions to be without merit.

It is ORDERED and ADJUDGED that the judgment of the
district court is affirmed.

By the Court,

JOHN GIBBONS,
Circuit Judge.

Attest

THOMAS F. QUINN,
Clerk.

Dated: Jan 24 1977

No. 76-1164

Supreme Court, U. S.
FILED

JUN 9 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

JEFFREY PETER SNYDER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1164

JEFFREY PETER SNYDER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 14-15) is noted in a table at 547 F. 2d 1165.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1977. The petition for a writ of certiorari was filed on February 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury concerning the proof required of petitioner's knowledge that he was dealing with federal officials.

2. Whether the evidence was sufficient to sustain petitioner's conviction under 18 U.S.C. 1501 of obstructing service of an arrest warrant.

3. Whether petitioner's conviction on three counts arising out of the same incident violates the Double Jeopardy Clause.

STATUTES INVOLVED

18 U.S.C. 111 provides in relevant part:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

18 U.S.C. 1501 provides in relevant part:

Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States, or United States magistrate * * * [s]hall, except as otherwise provided by law, be fined not more than \$300 or imprisoned not more than one year, or both.

26 U.S.C. 7212(a) provides in relevant part:

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs

or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined * * * or imprisoned * * *. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

STATEMENT

On April 22, 1976, Internal Revenue Service (IRS) agents Deborah Parks and Allen Rawls went to the residence of Keith Miller in order to serve him with a civil summons requiring him to appear to give testimony (Tr. 8-9). Petitioner answered the door, admitted the agents into the house, and left the room (Tr. 9-10). Miller soon appeared, and Agent Parks displayed her credentials to him, identified herself and Agent Rawls as IRS employees, and served the summons. While Agent Parks was explaining the summons, petitioner returned to the room, and Miller told him, "Clyde, they have a summons for me." At that point, petitioner grabbed the summons from Miller's hand and ordered the agents to "Get out of this God damned house * * * You people from the * * * Internal Revenue Service have no reason to be here" (Tr. 11). Petitioner then grabbed Agent Rawls' lapel and shoved the summons into his pocket. He put his hand on the back of Agent Parks' neck, applying pressure, and forcibly pushed her out of the door (Tr. 12, 45-46). Petitioner then took the summons, which Agent Rawls had in the meantime removed from his pocket and left on a table, crumpled it up, and threw it out the door after them, shouting "Don't you come back here again, you black fucker" (Tr. 46).

That afternoon, Charles R. Nagy, a criminal investigator with the Internal Revenue Service, obtained a warrant for petitioner's arrest for assaulting a federal officer (Tr. 62, 66). He and several other IRS inspectors (Tr. 67) proceeded to the Miller residence in official cars bearing government license plates and marked "U.S. Government Vehicle, Interagency Motor Pool" on the side. At about 7:00 p.m. petitioner approached the house in an automobile, but, seeing the agents standing outside, he sped off (Tr. 106-108). Two of the agents pursued him at a high speed and attempted unsuccessfully to stop him by placing their vehicle across petitioner's path (Tr. 110-111). The agents finally pulled alongside petitioner's car as he stopped at an intersection for a red light; one agent got out of his car, showed his credentials to petitioner, identified himself as a federal officer, and ordered petitioner to get out of his car (Tr. 113). When the light turned green, however, petitioner drove off (Tr. 114). He was apprehended later that night at the Miller residence (Tr. 76-80).¹

At trial, petitioner denied the assault on Agent Parks and the intimidating acts against her and Agent Rawls (Tr. 312). He also testified that, when he drove past the house on the evening of the assault, he was on his way to the bank and suddenly found himself being chased by another car; he stated that while stopped at a traffic light he was approached and threatened by one of the men in the car, who sprayed him and his passenger with mace (Tr. 317).

¹The petition sets forth petitioner's version of the facts (Pet. 3-4) and omits the evidence tending to contradict his version. On review of a conviction, of course, the evidence must be considered in the light most favorable to the prosecution.

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on all four counts charged: Count 1, forcible assault of a federal official (Agent Parks), in violation of 18 U.S.C. 111; Count 2, forcibly resisting, opposing, impeding, intimidating, and interfering with federal officials (both agents), in violation of the same statute, 18 U.S.C. 111; Count 3, endeavoring to intimidate and impede, by force or threats of force, officers of the Internal Revenue Service, in violation of 26 U.S.C. 7212(a); and Count 4, knowingly and willfully obstructing, resisting, and opposing federal officers attempting to execute a warrant for his arrest, in violation of 18 U.S.C. 1501 (Pet. 2-3).² The first three counts arose from events of the morning of April 22, 1976, while the fourth count arose from the chase of petitioner by IRS investigators that evening.

Petitioner was sentenced to concurrent terms of 179 days' imprisonment on the first and fourth counts to be followed by concurrent three-year terms on the second and third counts. The three-year terms for Counts 2 and 3 were suspended, and petitioner was placed on probation on those two counts.

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the trial court incorrectly instructed the jury that it was immaterial as to all four counts whether petitioner knew, at the time federal agents presented themselves, that the agents were officers of the United States.

²A copy of the indictment in this case has been lodged with the Clerk of this Court.

(a) Petitioner simply misreads the record as to the jury instructions concerning Counts 3 and 4, which charged violations of 18 U.S.C. 1501 and 26 U.S.C. 7212(a). The trial court expressly advised the jury that, in order to have violated 26 U.S.C. 7212(a), petitioner must have known that the agents "were Internal Revenue Agents, and that they were acting in their official capacity. * * * This statute specifically sets up an additional offense which requires proof beyond a reasonable doubt that they knew they were Internal Revenue Service servants and agents" (Sup. Tr. 20, 23).³ A similar instruction, to the effect that petitioner must have known that the agents "were engaged in the performance of their official duties," was given concerning the elements of 18 U.S.C. 1501 (see Sup. Tr. 24, 26).

(b) As to the instruction concerning 18 U.S.C. 111, this Court has held that Section 111 does not "embod[y] an unexpressed requirement that an assailant be aware that his victim is a federal officer." The statute requires only an intent to assault. *United States v. Feola*, 420 U.S. 671, 684. The instruction given by the trial court correctly stated this principle (Sup. Tr. 17-18, 19).

Petitioner, however, points to language in *Feola* and in an earlier Third Circuit case⁴ suggesting that in certain circumstances a person's knowledge of the identity of his victim might be relevant to establishing a violation of 18 U.S.C. 111. Specifically, if there were no indication that the person against whom force was used was a federal official, and if use of force against an ordinary citizen

³"Sup. Tr." refers to the supplemental transcript, setting out the charge of the trial court on June 30, 1976.

⁴*United States v. Goodwin*, 440 F. 2d 1152 (C.A. 3).

would be lawful in the circumstances, the requisite *mens rea* for the offense of assault might be lacking. See 420 U.S. at 686. Petitioner complains that an instruction setting forth this exception should have been given.

In the circumstances of this case, any error in failing to give such an instruction was harmless. The jury found petitioner guilty on Count 3, charging him with impeding IRS agents knowing that they are federal officials; this count related to the same incident at the Miller residence that was the subject of the assault counts. There is accordingly no possibility that the jury, under different instructions, would have found that Rawls and Parks were not IRS agents for purposes of Counts 1 and 2, relating to 18 U.S.C. 111, as well. Whether *mens rea* might have been lacking if petitioner had not known the official status of Agents Rawls and Parks is therefore an entirely hypothetical question, and irrelevant in this case.

2. Petitioner contends (Pet. 7-9) that the government's evidence concerning the events of the evening of April 22, 1976, did not prove a violation of 18 U.S.C. 1501 because petitioner merely fled and therefore did not "obstruct, resist or oppose" federal officials in their attempt to serve an arrest warrant on him. Whatever the merit of this contention—and for the reasons set out below we believe it has none—petitioner's sentence on Count 4, to which this contention applies, was concurrent with his sentence on Count 1, to which it does not apply. There is accordingly no need for this Court to review this contention. See *Barnes v. United States*, 412 U.S. 837, 848 n. 16.

The trial court instructed the jury that it could not find a violation of the statute if petitioner merely fled. It noted, however, that flight, together with additional circumstances

of resistance such as circumventing a roadblock, could constitute a violation of the statute (Sup. Tr. 25-26).⁵

This jury instruction was proper. While the issue has arisen infrequently, it was long ago held that obstruction of an officer includes any acts which "hinder, impede, or in any manner interrupt or prevent" the service or execution of process and "does not necessarily imply the employment of direct force." *United States v. McDonald*, 26 F. Cas. 1074, 1077 (No. 15,667) (C.C. E.D. Wis.); *Re: Charge to Grand Jury, McDonald*, 30 F. Cas. 983 (No. 18,250) (C.C. D. Mass.); see also *District of Columbia v. Little*, 339 U.S. 1, 6 and n. 6. Indeed, it has been stated that if a person, after being asked to come with an arresting officer, says he will not come and does not come, his actions constitute resistance of the officer within the prohibition of the statute. *United States v. Lukins*, 26 F. Cas. 1011 (No. 15,639) (C.C. D. Pa.) (Circuit Justice Washington). The government's evidence in this case showed that petitioner, after being asked by the officer to get out of his car, refused to do so and sped off; it also showed that petitioner circumvented a roadblock of a car clearly marked as a government car (Tr. 110-113). These acts constituted ample evidence from which the jury could find a violation of 18 U.S.C. 1501.

3. Finally, petitioner attacks (Pet. 9-11) his conviction for three offenses arising out of the events of the morning of April 22 at the Miller residence as violating the Double Jeopardy Clause. This claim is without merit.

⁵ *Miller v. United States*, 230 F. 2d 486 (C.A. 5), on which petitioner relies (Pet. 8), holds only that a person's refusal to permit officers without a search warrant to enter his residence does not violate 18 U.S.C. 1501. *United States v. Cunningham*, 509 F. 2d 961 (C.A. D.C.), is similarly inapposite; it construes 18 U.S.C. 111, a statute which prohibits "forcible" interference with law enforcement officers, an element not required to be proved under Section 1501.

While it has been suggested that the Double Jeopardy Clause, in addition to prohibiting multiple trials for the same offense, also protects against multiple punishment for a single offense (*North Carolina v. Pearce*, 395 U.S. 711, 717), it is well settled that the constitutional provision does not bar joinder at a single trial of offenses arising out of a single transaction whenever those offenses survive the "same elements" test of *Blockburger v. United States*, 284 U.S. 299. See *Gore v. United States*, 357 U.S. 386, 392-393; *Abbate v. United States*, 359 U.S. 187, 198-199 (Brennan, J.). And contrary to petitioner's contention (Pet. 10), whether two offenses are the same depends on the statutory elements of the offenses and not simply upon a congruence of the evidence introduced to prove the crimes in particular cases. *Iannelli v. United States*, 420 U.S. 770, 785 n. 17.

In the present case, Counts 1 and 2 did indeed charge the same offense—in that both entailed violations of 18 U.S.C. 111. However, although the offenses were roughly contemporaneous, they did not arise from the same transaction. Count 1 related to the physical battery of Agent Parks, while Count 2 involved the quite distinct actions by petitioner intimidating and impeding both agents through use of obscene and abusive language and threats, which constituted a show of force in the circumstances (Sup. Tr. 21-22).

While Count 3, which charged that petitioner endeavored to intimidate and impede Agents Parks and Rawls by force or threats of force, knowing them to be IRS officers, while they were acting in their official capacity, arguably was established by the same evidence as that adduced to prove Count 2, the multiple convictions entailed no error. Petitioner received concurrent sentences for these two counts, and therefore, even if they were the

"same" offense, he was subject neither to the separate trial nor the multiple punishment that the Double Jeopardy Clause might be thought to proscribe.⁶

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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⁶These two counts do not, in any event, offend the *Blockburger* test. Only Count 3 requires proof that force or threats of force were used against the agents with the knowledge that they were Internal Revenue agents in the performance of their duties under Title 26. See *United States v. Johnson*, 462 F. 2d 423, 428 (C.A. 3). Conversely, Count 2 requires proof of present ability to inflict harm, unlike Count 3, which is satisfied by proof of threats of force that interfere with performance of duty (*ibid.*).